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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMUNDO AVILA,

Defendant and Appellant.

B214913

(Los Angeles County
Super. Ct. No. TA099105)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Kevin D. Filer, Judge. Affirmed as modified.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C.
Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

A jury convicted Raymundo Avila of rape, felony false imprisonment, forcible rape, corporal injury to a cohabitant or child's parent, assault with intent to commit rape, and two counts of misdemeanor sexual battery by restraint. (Pen. Code, §§ 261, subd. (a)(2), 236, 273.5, subd. (a), 220, and 243.4, subd. (e)(1), respectively.) He was sentenced to 11 years in state prison. He appeals from the judgment of conviction, contending: (1) that his conviction of felony false imprisonment must be reversed, because the evidence is insufficient to prove that he accomplished the false imprisonment by violence or menace; and (2) that he is entitled to one more day of credit for actual presentence custody.

We reject the contention that the evidence is sufficient to support the conviction for felony false imprisonment, but agree that Avila is entitled to an additional day of presentence custody credit. We therefore modify the judgment to award one more day of presentence custody credit, and affirm the judgment as modified.

FACTS

Prosecution Evidence

Avila's convictions all stem from violent acts committed against the mother of his child and live-in girlfriend of four years, Mercedes F., on the evening of August 9, 2008. Because Avila challenges only his conviction for false imprisonment, we do not provide an in-depth discussion of the record, except as it pertains to the false imprisonment charge.

Mercedes testified to the following. Avila and Mercedes attended a birthday party held in their apartment building. Avila had approximately eight beers. Avila and Mercedes danced together at the party, and were having a good time. At

approximately 11:00 to 11:30 p.m., Mercedes returned to apartment she shared with Avila. Avila came to the apartment ten minutes later and used the bathroom. Mercedes told him she was tired and wanted to go to sleep, and Avila returned to the party.

Mercedes went to sleep, but was awakened at 1:00 or 1:30 a.m. Avila was on top of her, naked. Mercedes asked him what he was doing, and he told her he wanted to have sex with her. Mercedes told him no, that he was drunk and she was tired and wanted to sleep. Avila said that he was fed up with her not wanting to have sex with him. He slapped her in the face twice, and held her hands against the bed. He forcibly removed her pants and had vaginal intercourse with her, ignoring Mercedes' requests that he stop. Mercedes tried to push him off, and he began slapping her on the leg and arm.

Avila then tried to place Mercedes on top of him and attempted to penetrate her again, but he was unable to get aroused. He threw her to the side of the bed, and told her to "Go away," and that she was "not good for anything, not good, not even as a woman." However, when she tried to leave, he pulled her by the hair back to the bed, and started hitting her on the leg and arm. Trying to get away from him, she pushed her feet against his abdomen and he fell into a large mirror that was next to the bed. The mirror broke on top of him.

When Avila lay there still and did not get up, Mercedes got very scared. She got up, pulled her pants on, ran out of the bedroom and attempted to leave the apartment. As she was trying to open the front door, Avila grabbed her by the hair and asked her where she was going. He told her that she was going to leave when he wanted, not when she wanted. She tried to get away but he was holding her "really hard." He pulled her by the hair again and pushed her onto the sofa next to

the door. He told her to go to the bedroom, and when she refused, he said, “Go or I take you,” grabbed her by the hair again, and pulled her into the bedroom.

Mercedes and Avila sat on the sofa in the bedroom, and he told her not to cry anymore. After she cried for ten more minutes, he left and went to the sofa in the living room. Mercedes testified on cross-examination that a short while later Avila “let” her pass by him and go into her children’s bedroom, where she locked herself in. She further explained that it was too dark for her to tell whether or not Avila was asleep on the sofa in the living room. She remained in the children’s bedroom until morning because the sofa on which Avila was lying was next to the door leading to the apartment exit, and she was afraid that if she left the children’s bedroom he would “hit [her] or do something to [her] again.”

Early the next morning, Mercedes left the children’s bedroom and saw that Avila was now asleep in their bedroom. She did not know what time he had moved there. She grabbed the car keys and left for the police station without eating or taking a shower.

Defense Evidence

Avila testified that, after he left the party and came to bed, he and Mercedes initially had consensual sex. However, she pulled away because she did not want to continue having sex, and so he slapped her. When she responded by hitting him with a closed fist, he held her by the hair. She then started choking him, and he slapped her arm. She kicked him and he fell on top of the mirror, which shattered.

Mercedes ran out of the room, and after he lay stunned on the mirror for 15 or 20 seconds, he followed Mercedes to stop her from leaving. He testified that he wanted to prevent her from leaving because she was drunk, and because he was afraid she might try to drive the car. He grabbed her by the arm and pulled her,

and she resisted and told him she wanted to leave and to let her go, but he did not let go. They were pulling each other, and she pushed him. He hit her on the arm, and they fell on the sofa, continuing to push and pull each other. Mercedes then went towards the bedroom, but when she was about to go inside the bedroom he tried to stop her from going there by pulling her hair and hitting her arm. They struggled, but Mercedes managed to enter the bedroom, where she ripped his shirt and he pushed her against the sofa. They remained on that sofa together for a few minutes, and Mercedes was crying. They both calmed down, and then Avila went out to the sofa in the living room, where he fell asleep. He testified that he never saw Mercedes come out of their bedroom.

DISCUSSION

I. Sufficient Evidence Supports The Conviction For Felony False Imprisonment

Avila contends that his conviction for felony false imprisonment must be reversed because there was insufficient evidence to support it, and further contends that there was also insufficient evidence to support a conviction for the lesser crime of misdemeanor false imprisonment. Because we find that the conviction for felony false imprisonment was supported by substantial evidence, we need not address the latter contention.

In assessing a claim of insufficiency of evidence, the reviewing court's task is to "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the

testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Reversal of a conviction for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

“False imprisonment is the unlawful violation of the personal liberty of another.” (Pen. Code, § 236.) In this context, a victim’s personal liberty is violated when he is ““compelled to remain where he does not wish to remain, or to go where he does not wish to go.” [Citations.]” (*People v. Reed* (2000) 78 Cal.App.4th 274, 280.) “It is the restraint of a person’s *freedom of movement* that is at the heart of the offense.” (*Ibid.*) The victim need not be confined in an enclosed space. (*People v. Dominguez* (2010) 180 Cal.App.4th 1351, 1357 (*Dominguez*).) “False imprisonment may be committed by words or acts and merely by operation upon the will of the individual or by personal violence, or both. [Citations.]” (*Id.* at pp. 1360-1361; see *People v. Zilbauer* (1955) 44 Cal.2d 43, 51.)

“False imprisonment is a misdemeanor unless it is ‘effected by violence, menace, fraud, or deceit,’ in which case it is a felony.” (*People v. Wardell* (2008) 162 Cal.App.4th 1484, 1490 (*Wardell*), quoting Pen. Code, § 237, subd. (a).) “‘Force is an element of both felony and misdemeanor false imprisonment. Misdemeanor false imprisonment becomes a felony only where the force used is greater than that reasonably necessary to effect the restraint. In such circumstances the force is defined as “violence” with the false imprisonment effected by such violence a felony.’ [Citation.]” (*People v. Castro* (2006) 138 Cal.App.4th 137, 140 (*Castro*).) “Menace is a threat of harm express or implied by words or act.

[Citation.]” (*Dominguez, supra*, 180 Cal.App.4th at p. 1359; see *People v. Reed, supra*, 78 Cal.App.4th at p. 280.) In this case, the jury was instructed that “menace means a verbal or physical threat of harm including use of any deadly weapon[;] threat of harm may be express or implied.”

To support his contention that his conduct did not constitute felony false imprisonment, Avila primarily relies upon *People v. Matian* (1995) 35 Cal.App.4th 480 (*Matian*). In *Matian*, the defendant was convicted of sexual battery by restraint, felony false imprisonment, and genital penetration with a foreign object. The published portion of the Court of Appeal’s opinion dealt only with the false imprisonment conviction, and did not address the facts in the record that supported the sexual battery and genital penetration convictions. The court found that “[t]he evidence supporting the conviction for felony false imprisonment consists of the just completed sexual assaults during which appellant squeezed Olga E.’s breast sufficiently hard to cause her pain, and possibly even bruising. She testified after the ordeal she had her husband take photos of her breast but the photos did not turn out. After the assaults she prepared to go by gathering up her bookbag. Appellant then grabbed her arm and yelled at her not to go. He yelled at her, ‘nothing happened’ and told her to go wash her face. She then retreated to a chair and appellant went into an office nearby within view of Olga E. Each time she got up from her chair, appellant glared at her and got up out of his chair to approach her. She testified she was afraid, did not want him to touch her again and sat back down.” (*Id.* at p. 485.)

The defendant contended that this conduct in effecting the false imprisonment of Olga E. involved neither violence nor menace. The respondent “tacitly agree[d]” that the facts in did not support a conviction for false imprisonment by violence, and thus the focus on appeal was whether the false

imprisonment was effected by menace. (*People v. Matian, supra*, 35 Cal.App.4th at p. 485.) The court noted that “‘menace’ is defined as “‘a threat of harm express or implied by word or act’” [citations],” (*id.* at p. 484) and it determined that “[t]he reported decisions upholding convictions for felony false imprisonment involving menace generally fall into two categories. In the first category of cases there was evidence the defendant used a deadly weapon to effect the false imprisonment. . . . [¶] The second category of cases upholding convictions for felony false imprisonment involving menace presented evidence the defendant verbally threatened harm.” (*Id.* at pp. 485-486.)

The court then held that “[t]he facts in the case at bar do not support a finding the false imprisonment was effected by menace. The only evidence of ‘menace’ or ‘implied threat of harm’ in this case would have to be based on appellant’s earlier sexual assaults causing pain and possible injury and later glaring at her while getting out of his chair and approaching her each time she tried to leave. Based on the foregoing authorities however, this evidence is inadequate to establish an express or implied threat of harm. There was no evidence of a deadly weapon. Nor is there anything in the record to indicate the defendant ever verbally threatened Olga E. with additional physical harm. Similarly, there was no evidence to suggest appellant raised his fist or otherwise made any threatening movements suggesting harm each time Olga E. got out of the chair to leave. [¶] Based on the lack of evidence of either violence or menace in restraining Olga E. against her will, we must reverse appellant’s conviction for felony false imprisonment.” (*People v. Matian, supra*, 35 Cal.App.4th at pp. 486-487.)

Avila contends that after the sexual assault his conduct towards Mercedes was no more menacing than that in *Matian*, in which the defendant grabbed the victim’s arm after sexually assaulting her, yelled at her not to go and that “nothing

happened,” and glared at her from a nearby office each time she got up from her chair. Avila focuses on the part of the trial testimony establishing that ultimately he sat with Mercedes for ten minutes in the bedroom, left her there to go out to the sofa in the living room, and then did not interfere when she locked herself in the children’s bedroom. He contends that, under *Matian*, his conviction for felony false imprisonment is unsupported, because his conduct did not involve the use of a weapon or threats of further harm. We find that the reasoning of *Matian* does not control here, for several reasons.

First, while *Matian* involved only the issue of whether the defendant had effected a false imprisonment by menace, in Avila’s case the jury reasonably could have found that Avila used actual violence against Mercedes, over and above the force necessary to restrain her. In *People v. Castro*, *supra*, 138 Cal.App.4th 137, this Court determined that sufficient evidence supported the defendant’s conviction for felony false imprisonment when, after driving up to a teenage girl and making lewd comments, the defendant grabbed the victim, turned her around, and pulled her towards his car. We reasoned that simply grabbing the victim and turning her around did not amount to felony false imprisonment, but the act of pulling her towards the car was “more than what was required to stop her and keep her where she was located.” (*Id.* at p. 143.) “[T]he evidence that appellant used force to pull the victim toward his car was sufficient to establish force above that required for

misdemeanor false imprisonment.”¹ (*Ibid.*) The fact that the defendant had not used a weapon or made explicit threats with words or gestures was not found to be dispositive.

Ample evidence in the case at bar demonstrates that Avila used force beyond what was necessary to restrain Mercedes, and therefore a jury reasonably could have found that he committed false imprisonment by violence. After Avila had beaten and raped Mercedes, he threw her to the side of the bed and told her to “go away.” When she tried to leave, however, he pulled her by the hair back to the bed, and started beating her on the leg and arm. While Avila contends that this assault was still part of the sexual assault, the jury reasonably could have found that this was a separate act of violence designed to restrain Mercedes on the bed, after the rape, and that the conduct constituted force above and beyond that necessary to restrain her.

The jury also reasonably could have found false imprisonment effected by violence based on Avila’s conduct when Mercedes was trying to run out the front door, after being assaulted in the bedroom. Mercedes testified that Avila grabbed her by the hair and threw her onto the sofa as she was trying to leave the apartment, then grabbed her by the hair and dragged her back into the bedroom. Avila himself acknowledged at trial that when Mercedes was trying to leave the apartment, he grabbed her arm and pulled her, refused to let her go despite her requests that he do so, hit her on the arm, and then tried to stop her from going into

¹ In *Castro*, we ultimately reversed the conviction for felony false imprisonment, finding that the trial court committed prejudicial error in failing to instruct the jury on the lesser included offense of misdemeanor false imprisonment. (*Id.* at p. 144.) We found that, in the case, the facts available from the record were “sufficiently ambiguous that a conviction for misdemeanor false imprisonment might also have been justified, depending on the actual force appellant used in drawing the victim toward himself.” (*Ibid.*) In Avila’s case, the trial judge instructed the jury on misdemeanor as well as felony false imprisonment, but the jury convicted Avila of the felony count.

the bedroom by pulling her hair and hitting her arm again. Based on these facts, a reasonable trier of fact could have found Avila guilty beyond a reasonable doubt of using force against Mercedes beyond that necessary to stop her from leaving the apartment. The actual violence Avila used against Mercedes after the rape and initial beating sets it apart from the *Matian* case.

Second, notwithstanding the holding in *Matian*, we conclude that there was sufficient evidence that Avila committed false imprisonment by menace. In *Castro, supra*, this Court noted its disagreement with the holding in *Matian*, stating: “While the [*Matian*] opinion does not discuss the underlying sexual crimes, it is clear that the false imprisonment followed immediately after the forcible sexual assaults during which appellant squeezed the victim’s breast so hard as to cause her pain and possibly even bruising. Thereafter, the perpetrator yelled at the victim ‘nothing happened,’ attempting to intimidate her into not reporting the incident. He then told her to wash her face and she took a seat nearby, within view of the perpetrator who was in his office. When the victim attempted to leave, the perpetrator glared at her and got out of his chair as if he was going to approach her. Given the immediately preceding sexual assaults, and the command to her that ‘nothing happened,’ it is reasonable to conclude the victim was intimidated by the perpetrator. In fact, she testified that she was afraid and did not want him to touch her again. We have no problem with concluding the evidence addressed in the published portion of the opinion supported the conviction for felony false imprisonment by menace, if not violence. Thus, we do not agree with the result in *Matian*.” (*Castro, supra*, 138 Cal.App.4th at p. 143.)

In *People v. Aispuro* (2007) 157 Cal.App.4th 1509 (*Aispuro*), the Court of Appeal similarly concluded that the facts in *Matian* were sufficient to establish false imprisonment by menace. (*Id.* at p. 1513.) The court determined that the

Matian court had “erroneously required evidence of a deadly weapon or an express verbal threat of additional physical harm before menace could be found.” (*Ibid.*)

The court held: “An express or implied threat of harm does not require the use of a deadly weapon or an express verbal threat to do additional harm. Threats can be exhibited in a myriad number of ways, verbally and by conduct. There can be no doubt that *Matian*’s conduct constituted a threat of harm to his victim, even though he did not specifically say to the victim, ‘If you leave I’m going to physically harm you,’ and even though he did not raise his fist or display a deadly weapon.” (*Ibid.*)

In *Wardell, supra*, the Court of Appeal agreed with the criticism of *Matian* in *Castro* and *Aispuro* and similarly held that “[a]n express threat or use of a deadly weapon is not necessary” to sustain a conviction for false imprisonment by menace. (*Wardell, supra*, 162 Cal.App.4th at p. 1491.) Rather, a jury may reasonably find that a defendant committed false imprisonment by menace when it “could conclude that a defendant’s acts or words expressly or impliedly threatened harm.” (*Ibid.*)

We agree that a defendant need not have used a deadly weapon or verbally threatened further harm in order to be found guilty of false imprisonment effected by menace. In some cases, the defendant’s conduct and words devoid of any express threat can constitute implied threats of harm if the victim attempts to free him or herself. As discussed below, there was sufficient evidence of implied threats of further harm to Mercedes to support the felony false imprisonment conviction.

Avila’s conduct in sexually assaulting and beating Mercedes is highly relevant to determining whether he subsequently committed false imprisonment by menace. Given what had already occurred, Avila’s statement that Mercedes would leave when he wanted, not when she wanted, could reasonably have been viewed

as an implicit threat to assault her again if she tried to leave the apartment that night. (See *Castro, supra*, 138 Cal.App.4th at p. 143 [“Given the immediately preceding sexual assaults, and the command to [the victim] that ‘nothing happened,’” *Matian* jury could reasonably have concluded that false imprisonment was effected by menace].) After Avila left Mercedes crying on the sofa in the bedroom and went out to the sofa in the living room, she went into the children’s bedroom, which was next door to her bedroom, and locked herself in. Mercedes testified that she was afraid to leave the children’s bedroom because Avila had placed himself on the sofa between Mercedes and the front door of the apartment, and she feared that if she tried to leave the apartment, “he would hit me or do something to me again.” She was frightened enough that she considered climbing out of the window of her children’s room. Avila’s conduct left Mercedes terrorized and afraid that he would hurt her if she tried to leave the apartment. A rational jury could have found that Avila’s actions and words impliedly threatened further harm, and thus there was substantial evidence supporting the conviction for false imprisonment effected by menace.

II. *Avila Is Entitled To 204 Days of Credits*

The court credited Avila with 177 days of actual custody credit, and 26 days of credit for good conduct, for a total of 203 days of presentence custody credits. On September 19, 2009, Avila sent a letter to the trial court requesting that the superior court correct the abstract of judgment to give Avila one additional day of actual custody credit. While this appeal was pending, the trial court amended the abstract of judgment, of which we have taken judicial notice. The new abstract of judgment reflects 144 days of actual credit, and 34 days of credit for good conduct, for a total of 178 credits. Rather than adding one additional day of credit for a total

of 204 days as Avila requested, the trial court reduced the total days of credit by 35 to a total of 178.

Avila contends, and respondent agrees, that he is owed one more day of credit – 178 days, rather than 177 -- for actual time spent in custody prior to sentencing. Avila was arrested on August 10, 2008. He was sentenced on February 3, 2009. The day of sentencing must be counted towards the total count of days in actual custody. (*People v. Browning* (1991) 233 Cal.App.3d 1410, 1412.) Accordingly, Avila was entitled to a total of 178 days of actual custody credit. We therefore order the trial court to correct the amended abstract of judgment to reflect 178 days of actual custody credits, and 26 days of conduct credits, for a total of 204 credits.

DISPOSITION

The judgment is modified to reflect that Avila is entitled to 178 days of actual custody credits and 26 good conduct credits, for a total of 204 days. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment to reflect the total of 204 presentence credits, and to forward a copy thereof to the Department of Corrections and Rehabilitation.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.